STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL RUSSELL and CHRISTINA RUSSELL, Plaintiffs-Appellants, v RAMSEY HOLDING LLC, Defendant-Appellee.	UNPUBLISHED March 27, 2007 No. 273144 Jackson Circuit Court LC No. 05-005634-NO

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In this premises liability case, plaintiffs[1] appeal as of right from an order granting summary disposition in favor of defendant. We reverse and remand.

I.

On the day of the accident in question, plaintiff was setting up his workstation at a new facility. While looking for equipment related to his workstation, plaintiff drove a forklift into the dock area of the facility. According to plaintiff, the area was poorly lit and, as a result, he did not notice a pit located immediately in front of a docking bay until it was too late to avoid. Plaintiff stated that, when he realized that he was going to drive into the pit, he leapt down from the forklift. However, before he could climb out of the pit, the forklift tipped into the pit and crushed his upper torso and hip.

Plaintiff sued defendant, which entity is the owner of the building where plaintiff was injured and from which plaintiff's employer leased space. Plaintiff claimed that defendant was liable for his injuries as a result of its failure to post warnings or barricade the pit under the doctrine of retained control of a common work area or under ordinary premises liability. Defendant moved for summary disposition of plaintiff's claims. Defendant contended that the pit was not a common work area subject to the common work area doctrine. Defendant also argued that it did not retain possession and control of the area where the accident occurred and,

[1] For ease of reference, we shall refer to plaintiff Michael Russel alone as "plaintiff."

even if it were in possession and control, the hazard was open and obvious. Hence, it had no duty to warn or protect plaintiff from the hazard posed by the pit. The trial court agreed that the common work area doctrine did not apply to the facts of this case and agreed that the hazard was open and obvious as a matter of law. Therefore, the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10). This appeal followed.

II.

On appeal, plaintiff argues that the trial court erred when it concluded that, even if defendant were in possession and control of the premises, it would have had no duty to warn or barricade the pit because the pit was an open and obvious danger. We conclude that there are questions of fact concerning the open and obvious character of the pit and whether the pit has special circumstances. Because a jury must resolve these questions of fact, we agree that the trial court erred when it determined that the pit was an open and obvious hazard as a matter of law.

This Court reviews de novo a trial court's decision to grant summary disposition. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 153; 721 NW2d 233 (2006). In order to warrant summary disposition under MCR 2.116(C)(10), the moving party must submit evidence that negates an essential element of the nonmoving party's claim or demonstrates that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), quoting *Celotex v Catrett*, 477 US 317, 331; 106 S Ct 2548; 91 L Ed 2d 265 (1986). Once the moving party has met this burden, the nonmoving party has the burden of presenting sufficient evidence to establish that a genuine issue of disputed fact exists. *Id.*

In the present case, defendant presented evidence to the trial court that the pit was an open and obvious hazard. Because the pit was open and obvious, defendant argued, it had no duty to warn plaintiff about the existence of the pit or to take steps to mitigate the potential for harm posed by the pit. Duty is an essential element of a negligence cause of action. *Maiden v Rozwood*, 461 Mich 109, 131; 597 NW2d 817 (1999) ("'A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.'"), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Thus, if defendant had no duty to warn plaintiff or otherwise take steps to mitigate any harm posed by the pit, then plaintiff had no cause for action and summary disposition in favor of defendant was appropriate.

The threshold issue of whether the defendant had a duty cognizable at law is a question of law to be decided by the court. *Riddle, supra* at 95. However, the existence of facts, which give rise to a duty, is a question of fact for the jury to decide. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995). In *Bonin v Gralewicz*, 378 Mich 521, 526-527; 146 NW2d 647 (1966), our Supreme Court explained the distinction between the role of the jury and the role of the trial court when determining whether a defendant had a duty:

> Usually, in negligence cases, whether a duty is owed by the defendant to the plaintiff does not require resolution of fact issues. However, in some cases, as in this one, fact issues arise. When they do, they must be submitted to the jury, our traditional finders of fact, for ultimate resolution and they must be accompanied by an appropriate conditional instruction regarding defendant's duty, conditioned upon the jury's resolution of the fact dispute.

Hence, where the facts necessary to make a determination regarding the duty owed by a defendant to a plaintiff are not disputed, it is the trial court's responsibility to decide the legal import of those facts. However, if there are disputed facts, which, depending on how those facts are resolved, could alter the determination that the defendant owed a duty to the plaintiff, those facts must be submitted to the jury with an appropriate instruction. *Id*.

A possessor of land "has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).[2] However,

> "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." [*Riddle*, *supra* at 94, quoting 2 Restatement Torts, 2d, § 343A(1), p 218.][3]

Our Supreme Court has determined that the open and obvious doctrine is "an integral part of the definition" of the duty owed by premises possessors to their invitees. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Hence, where a dangerous condition is either known to the invitee or is open and obvious, the premises possessor owes no duty to protect the invitee from the danger. *Id.* at 517. In the present case, there is no evidence that plaintiff knew about the pit before he encountered it. Therefore, we must consider whether the pit constituted an open and obvious condition.

A condition on land is open and obvious if an average user with ordinary intelligence would have been able to discover the danger and risk presented by the condition on casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The evidence presented to the trial court indicated that the pit was positioned

---

[2] Although the parties have not directly addressed the issue, we note that plaintiff, as an employee of a business located in the building, was on the property at issue as an invitee. See *Stitt*, *supra* at 597 ("[I]nvitee status is commonly afforded to persons entering upon the property of another for business purposes.").

[3] Traditionally, a landowner was not liable for harms caused by known or obvious conditions on land without regard to whether the landowner should have anticipated the harm despite the knowledge or obvious character of the conditions. *Michalski v Home Depot, Inc*, 225 F3d 113, 118 (CA 2, 2000), citing Restatement of Torts, § 340. However, this complete defense was widely criticized prior to the adoption of the Restatement (Second) of Torts. See Fleming, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 Yale L J 605 (1954) and Keeton, *Personal Injuries Resulting From Open and Obvious Conditions*, 100 U Pa L Rev 629 (1952); see also Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers: Will it Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?*, 38 Tex Tech L Rev 1, 27-29 (2005).

immediately in front of a loading bay door on the inside of the building and was approximately six feet by eight feet. Testimony also established that the pit was from two to three feet in depth. However, plaintiff testified at his deposition that the lighting in the building was not "intense" and that as he drove the forklift towards the area where the pit was located it became darker. Plaintiff stated that he was unable to tell from a distance that the area in front of the bay door contained a pit. Instead, he stated that it looked like a "dark silhouette." Plaintiff said he did not realize that it was a pit until it was too late to avoid running into it with the forklift. Although an average user of ordinary intelligence would normally be able to discover the danger and risk presented by the pit on casual inspection, given the testimony about the lighting, we conclude that there is a question of fact as to whether the pit constituted an open and obvious condition. See *Abke v Vandenberg*, 239 Mich App 359, 362-363; 608 NW2d 73 (2000) (concluding that the trial court properly denied a motion for a directed verdict and judgment notwithstanding the verdict where there was conflicting evidence about whether the truck bay at issue was lighted such that it would have been open and obvious); *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 127; 492 NW2d 761 (1992) (concluding that an interior loading dock that was obscured by the dark was not open and obvious as a matter of law); see also *Boyle v Preketes*, 262 Mich 629, 633; 247 NW 763 (1933) (noting that, in the context of contributory negligence, an ordinary step might be a "concealed danger" where there is inadequate lighting). However, even if the pit were open and obvious, we conclude that there is a question of fact as to whether defendant still had a duty to take steps to protect plaintiff because the pit had special aspects that rendered it unreasonably dangerous.

As already noted, a premises possessor has no duty to protect an invitee from open and obvious hazards "'unless he should anticipate the harm despite such knowledge of it on behalf of the invitee.'" *Lugo*, *supra* at 516, quoting *Riddle*, *supra* at 96. Under the approach stated in the Restatement (Second) of Torts, a premises possessor should anticipate harm, "where the possessor has reason to expect that the invitee's attention may be distracted" or where he has reason to believe that "the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." 2 Restatement Torts, 2d, § 343A, comment f, p 220. However, although our Supreme Court has adopted 2 Restatement Torts, 2d, § 343A, see *Riddle*, *supra* at 94, it has not adopted these exceptions. Instead, our Supreme Court has held that a premises possessor's duty to protect invitees from open and obvious conditions only extends to those conditions that have special aspects that render those conditions unreasonably dangerous. *Lugo*, *supra* at 517.

> Consistent with *Bertrand*, we conclude that, with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Id.* at 517-518.]

A condition has "special aspects" that render it unreasonably dangerous where it is "effectively unavoidable" or where there is "a substantial risk of death or severe injury" to an invitee who encounters the condition. *Id.* at 518. "In sum, only those special aspects that give rise to a

uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 518-519.

In assessing whether the risk of harm posed by a particular condition is unreasonable, courts should examine the character, location and surrounding conditions. *Bertrand*, *supra* at 617. Hence, a condition that is not unreasonably dangerous at one location might nevertheless be unreasonably dangerous at a different location. Although a pit of this nature located in an area frequented primarily by pedestrians might not present a substantial risk of death or severe injury, in this case, the evidence indicated that the area where the pit was located was used as a warehouse and was open to persons operating forklifts. Because the potential for severe bodily harm or death is significantly greater should a forklift encounter the pit, a reasonable jury could conclude that the conditions surrounding the pit rendered the pit unreasonably dangerous and, therefore, removed it from the open and obvious doctrine.

For these reasons, we conclude that there were material questions of fact as to both whether the pit was open and obvious and whether the pit had special aspects that removed it from the open and obvious danger doctrine. Consequently, the trial court erred when it concluded that the pit was subject to the open and obvious doctrine and granted summary disposition to defendant on that basis.

III.

On appeal, defendant argues that, even if the pit was not a condition subject to the open and obvious doctrine, summary disposition in its favor was nevertheless appropriately granted on the alternate bases that it was not in possession and control of the premises where the accident occurred and or because there was insufficient evidence to create a genuine issue of material fact that plaintiff was less than fifty percent at fault for his injuries. We disagree with both arguments.

"Under the principles of premises liability, the right to recover for a condition or defect of land requires that the defendant have legal possession and control of the premises." *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83 (1994). Although ownership of the premises is relevant, it is not dispositive. "'Possession and control are certainly incidents of title ownership, but these possessory rights can be "loaned" to another, thereby conferring the duty to make premises safe while simultaneously absolving oneself of responsibility.'" *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 568; 563 NW2d 241 (1997) (emphasis removed), quoting *Merritt v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980). In the present case, defendant contends that plaintiff's employer, RTD Manufacturing, as lessee of the property, was in possession and control of the area where the accident occurred. Therefore, defendant continues, it could not be held liable for harms caused by the pit.

At his deposition, Bryant Ramsey testified that defendant company was formed for the purpose of purchasing the building that is the subject of the present case. Ramsey stated that he had a 10% interest in defendant, that his brother had a 10% interest and that his recently deceased father had held the remaining 80% interest. In addition to being a part owner of defendant, Ramsey stated that he worked for RTD under his father, who was the president. Testimony established that RTD leased a portion of the building in question from defendant and that RTD undertook all the improvements that occurred in the area where plaintiff was injured.

However, the lease between RTD and defendant does not specifically describe the space to be occupied by RTD. Further, the Sled Shed Enterprises, which was owned by Ramsey, his brother and his father, and Primary Maintenance Resource, which was owned by Ramsey's father with a business partner, also leased some of the building. Testimony further established that approximately half the building was to be made available for new tenants. David Smith, who testified that he was trying to find new tenants for the building, stated that he assumed that the area where the pit was located was being set aside for prospective tenants based on the fact that nothing had been set up in that area. Further, Ramsey testified that his father determined how the space would be divided between RTD and the Shed Sled Enterprises. Given this evidence, there is a question of fact as to whether defendant had actual possession and control over the area where plaintiff was injured.

Finally, the extent of plaintiff's comparative fault for his injuries, if any, is a question for the jury unless all reasonable minds could not differ on the matter. *Rodriguez v Solar of Mich, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991). In the present case, a reasonable jury could conclude that defendant's fault in maintaining the pit without guardrails or similar safety devices and in failing to properly illuminate the area was greater than that of plaintiff. Therefore, the issue of plaintiff's comparative negligence is an issue for the jury.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kurtis T. Wilder